76-134

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. A-1020

MARIE M. McMAHON,

Petitioner.

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully prays that a writ of certiorari be granted to review the judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit, entered March 1, 1976, entitled Marie M. McMahon, Administratrix of the Estate of Major Richard J. McMahon, AUS Retired, 0-1874291 (Deceased) v. United States of America.

OPINION BELOW

The per curiam decision of the United States Court of Appeals for the District of Columbia Circuit is not

reported in full, but is included in a table of decisions at 530 F.2d 1093. A copy of the memorandum opinion is set out in its entirety in Appendix A.

The judgment of July 17, 1974, by the Honorable Oliver Gasch, Judge of the United States District Court for the District of Columbia is set out in full in Appendix B.

Excerpts from joint appendix filed by the parties in the Court of Appeals are reprinted in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia (Appendix A) was entered on March 1, 1976. Application for extension of time in which to file this petition for Writ of Certiorari was filed in the United States Supreme Court on May 18, 1976, within ninety days of the date of judgment of the Court of Appeals. On May 19, 1976, Chief Justice Warren E. Burger signed an Order Extending Time to File Petition For Writ of Certiorari. This petition is filed within the time allowed by said Order.

The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

QUESTIONS PRESENTED

The questions presented by this case are:

(a) Is summary judgment premature where the moving party is in sole possession of facts necessary to substantiate the other party's claims yet has not complied with the opposing party's timely requests for discovery?

(b) On a motion for summary judgment, where the moving party is in sole possession of the necessary documentation and does not comply with discovery orders, thus preventing the opposing party from effectively contesting his statement of facts, does the granting of summary judgment effectively remove the moving party's burden of proving the absence of disputed material facts?

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 56, 28 *U.S.C.* (Text in Appendix D)

STATEMENT OF THE CASE

The petitioner, the personal representative of a decedent, filed a complaint for negligence and wrongful death under the Federal Tort Claims Act. Her claim had two bases: first, the negligent misdiagnosis of decedent's condition as chronic alcoholism; and second, harrassment and administrative negligence in processing decedent's requests for correction of his records and receipt of disability benefits, which exacerbated decedent's physical and emotional condition and eventually caused his death.

The decedent, United States Army Major Richard J. McMahon, was hospitalized in September 1963, with a diagnosis by Army doctors of chronic alcoholism. (Appendix B, pp. 3b). In January 1964, an Elimination Selection Board ordered McMahon to show cause why he should not be eliminated from the service. During the year 1964, McMahon had at least six

more seizures and his condition was diagnosed at least three times as a cerebral disorder (Appendix A, pp. 3a). Nevertheless, the Army continued to attribute his condition to alcoholism, and in January of 1965 McMahon was discharged from the service (Appendix B, pp. 4b). In February 1965, he applied to the Veterans Administration for a disability rating and was granted a 100 percent disability in May of 1965 for the cerebral disorder. He also petitioned the Army Board of Correction of Military Records to have his records altered to show retirement for a physical disability, but his application was rejected. McMahon subsequently applied again to the Correction Board. After a hearing in March of 1967, the Board rejected the recommendation of the Surgeon General's Office that the request was not meritorious and placed McMahon on the Temporary Disability Retired List. The Board also conceded, two years after McMahon's discharge, that the Army's failure to evaluate his physical disability properly at the time of discharge "was and continued to be in error and unjust." (Appendix B, pp. 5b). The Board recommended that McMahon's records be corrected to show that his discharge was of no force and that he was relieved from active duty because of physical disability.

During the next several years, McMahon was required to travel to Washington, D.C. from his home in West Virginia for periodic physical examinations. In April of 1969, a Physical Evaluation Board notified him of its recommendation to place him on permanent 20 percent disability. After McMahon contested this recommendation, the Board recommended 100 percent disability and McMahon concurred. Following the action by the Board, McMahon returned to West Virginia to pick up a

registered letter while his wife remained in Washington for medical treatment. The letter was an order from the Army directing him to come to Washington for "further physical examination." (Appendix C, pp. 21c). On May 6, 1969, he was found unconscious in his home and he died on June 5, 1969. Petitioner filed an administrative claim on May 28, 1971 which was denied by the Army on December 30, 1971. (Appendix C, pp. 9c). The instant action was filed on June 6, 1972.

Through motions for discovery, filed on November 6, 1972, petitioner sought to develop a factual record consisting of documents in the custody of the Army and the Veterans Administration and various interrogatories. Although several extensions were authorized, the respondent did not submit any of the interrogatories and furnished only a portion of the requested documents. Upon motion by the respondent, the District Court for the District of Columbia granted summary judgment in favor of the respondent. In a memorandum order entered July 19, 1974, the court found that there was no genuine issue as to any material fact and ruled that the applicable statute of limitations barred the claim based on the negligent misdiagnosis of McMahon's medical condition. The court further found with respect to the claim for emotional stress caused by administrative harrassment, that the Army followed its "normal procedures" and ultimately classified the decedent properly. (Appendix B, pp. 12b). The decision was affirmed by the Court of Appeals for the District of Columbia.

REASONS FOR GRANTING THE WRIT

A. The District of Columbia Circuit Has Departed From the Heretofore Uniform Principle That The Party Opposing Summary Judgment Must Be Given A Reasonable Opportunity To Gain Access to Proof, Particularly Where Facts Are Largely In The Possession Of The Moving Party.

The nature of petitioner's claims, especially the administrative negligence and harrassment claim, required a factual record which could only be derived from interrogatories and documents under the control of the Army and Veterans Administration. Yet the respondent only partially complied with the request for production of documents and never submitted the requested interrogatories. As a result, petitioner was severely hampered in contesting the selective factual scenario presented by the respondent. The District Court recognized this deficiency in the record at a hearing held on April 17, 1973 (Appendix C, pp. 21-22c), but did not deem it of importance when granting the motion for summary judgment. The Court of Appeals did not address the issue in its memorandum order, but affirmed the granting of summary judgment.

The action of the lower courts in this case is in sharp conflict with the rule prevailing in other circuits. This conflict is readily demonstrated by a review of representative cases from other circuits. For example, in *Illinois State Employers Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973), the Seventh Circuit ruled that where discovery is necessary to permit the opponent of a summary judgment motion to gather sufficient information to raise a material issue

of fact, he must be given the opportunity to pursue that discovery. Because the district court in *Lewis* ruled on the summary judgment motion before the opposing party's interrogatories were answered, its decision was reversed by the Seventh Circuit. The First Circuit reached the same conclusion in *Bane v. Spencer*, 393 F.2d 108 (1st Cir. 1968), *cert. denied*, 400 U.S. 866 (1970), where it is stated that "it should be fundamental that a defendant who has failed to answer relevant and timely interrogatories is, at least normally, in no position to obtain summary judgment." 393 F.2d at 109.

Rule 56(f) of the Federal Rules of Civil Procedure authorizes a court to refuse summary judgment or order a continuance where affidavits of the opposing party show that he cannot present by affidavit facts essential to justify his opposition. Had petitioner filed a Rule 56(f) affidavit, there is little question but that the lower court should have granted a continuance. For instance, in *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973), an action for personal injury and property damage as a result of sonic booms from military aircraft, the Third Circuit held that since the facts regarding operational negligence were solely in the possession of the Government, the district court should have granted a motion for continuance of a motion for summary judgment. But petitioner in the instant case did not file a Rule 56(f) affidavit; she merely submitted a Reply to Defendant's Motion for Summary Judgment (Appendix C, pp. 11c). According to the Fifth Circuit, this failure to comply with the strict letter of Rule 56(f) does not alter the compelling need to deny summary judgment. *Littlejohn v. Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972), *cert. denied*, 414 U.S. 1116

(1973). There the court held, in a suit for damages under the Robinson-Patman Act, that the district court erred in granting summary judgment before the plaintiff had an opportunity to discover basic jurisdictional facts from data solely within the defendant's possession, notwithstanding plaintiff's failure to oppose the summary judgment motion by means of an affidavit. The plaintiff in *Littlejohn* did, however, file a timely response to the defendant's motion for summary judgment. Although not in the form of an affidavit, this response adequately advised the court and opposing counsel of the plaintiff's reasons for opposing counsel of the plaintiff's reasons for opposing the motion. The Fifth Circuit deemed it inappropriate to affirm the summary judgment in favor of the defendants merely because of the plaintiff's failure to comply with the technical requirements of Rule 56(f). In the instant case, petitioner filed a timely response to the respondent's motion for summary judgment. While not in affidavit form, it, too, adequately advised the court and the respondent of her reasons for opposing the summary judgment motion. The rationale of *Littlejohn* compels a finding that the District Court erred in not denying the motion for summary judgment or in granting a continuance pursuant to Rule 56(f).

Because of the decision below, the District of Columbia Circuit now stands diametrically opposed to several other circuits on the important question of whether summary judgment should be deemed premature when the moving party is in sole possession of highly relevant factual materials and yet does not comply with orders for discovery. The effect of the harsh rule adopted by the District of Columbia Circuit is a diminution of the rights of future litigants where

one party is in exclusive possession of essential facts. The decision below would support such a party if he chose to circumvent discovery orders and move for summary judgment on whatever factual record he, in his discretion, chose to present.

B. The District of Columbia Circuit Has Departed From The Long-Established Principle That The Moving Party On A Summary Judgment Motion Bears The Burden To Show The Absence Of A Genuine Issue As To Any Material Fact.

This Court articulated pertinent principles regarding summary judgment procedure in *Adickes v. Kress & Co.*, 397 U.S. 144 (1970). The petitioner in *Adickes* was a white school teacher who was refused service in respondent's lunchroom while accompanied by six black students. The district court had granted summary judgment for the respondent on a count of conspiracy based on 42 *U.S.C.* §1983. This Court reversed the summary judgment order because the respondent had failed to carry the burden of showing the absence of any genuine issue of fact. *Adickes* declared that the moving party has the burden of showing that there is no genuine issue of material fact, and therefore, that the material submitted by the moving party in support of its motion must be viewed in the light most favorable to the opposing party. 398 U.S. at 157. The respondent in *Adickes* failed to foreclose the possibility that there was a policeman in the respondent's store who reached an understanding with his employee that petitioner was not to be served. This Court held that the respondent's burden was not altered by the fact

that the petitioner did not produce an affidavit asserting the presence of the policeman. Where the evidentiary matter in support of the summary judgment motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. 398 U.S. at 160.

The various circuits, including the District of Columbia, have, until the present case, uniformly adhered to the principles laid down in *Adickes. See, e.g., Bouchard v. Washington,* 514 F.2d 824 (D.C. Cir. 1975); *Redhouse v. Quality Ford Sales, Inc.,* 511 F.2d 230 (10th Cir. 1975); *United States Steel Corp. v. Darby,* 516 F.2d 961 (5th Cir. 1975); *Bloomgarden v. Coyer,* 479 F.2d 201 (D.C. Cir. 1973).

The circumstances in the instant case are in clear conflict with *Adickes.* Most of the facts in the respondent's Statement of Material Facts As To Which There Is No Genuine Issue (Appendix C, pp. 1c) pertain to petitioner's claim respecting misdiagnosis. There is virtually no mention of the many procedural and substantive obstacles which the Army and the Veterans Administration employed to prevent the decedent from receiving his rightful disability benefits and correcting his official military records. It is precisely these incidents which petitioner expected to document by means of discovery. Since the District Court ruled on the summary judgment motion before petitioner's discovery was completed, petitioner does not possess such facts as would be admissible in evidence to expand or refute the respondent's facts respecting administrative negligence and harrassment. Yet the District Court, whose decision was upheld by the Court of Appeals, concluded that there were no

disputed material facts, a conclusion based almost exclusively on the respondent's presentation.

The effect of this ruling, in a case where the moving party exclusively possesses the necessary documentation and does not comply with discovery, is to remove the respondent's burden of proving the absence of disputed material facts. Petitioner submits that the decision significantly erodes the procedural safeguards essential to summary judgment proceedings, contrary to the clear principles laid down by this Court in *Adickes,* and heretofore uniformly followed in all of the federal circuits.

CONCLUSION

The action of the Court of Appeals for the District of Columbia Circuit, which affirmed the granting of summary judgment by the District Court in favor of the respondent, was premature in that petitioner had not completed discovery. It also effectively removed respondent's burden to prove the absence of a genuine issue as to any material fact. This action is in sharp conflict with the rulings of both this Court and the other federal circuits, producing serious ambiguity for future cases involving a motion for summary judgment. Therefore, this Court should review and reverse the decision below.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED–SEE LOCAL RULE 8(b).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 74-1930 September Term, 1975
Civil 1132-72

Marie M. McMahon, Administratrix
of the Estate of Major Richard J.
McMahon, AUS Retired, 0-1874291
(Deceased), Appellant

v.

United States of America

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUBIA

Before: WRIGHT, McGOWAN and TAMM, Circuit Judges

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the

District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/George A. Fisher
George A. Fisher
Clerk

MEMORANDUM

Appellant, the personal representative of a decedent, appeals from the District Court's award of summary judgment against her as plaintiff in a tort action for "Negligence–Wrongful Death" against the United States. Decedent was an army officer who was discharged and later placed on disability due to a medical condition described as "localized cerebral cortical atrophy, manifested by temporary lobe and grand mal seizures," and who some years later died following a coma apparently caused by such a seizure. There are two bases for appellant's claim: first, the Army's initial misdiagnosis of his condition as chronic alcoholism; and, second, following the Army's correction of its diagnosis, harassment and administrative negligence in processing decedent's requests for correction of his Army records and for disability benefits.

Decedent was hospitalized twice during September and October 1963, and the diagnosis the second time was chronic alcoholism.[1] In November 1963 his elimination from the service was recommended, and an Elimination Selection Board convened for that purpose received a report confirming that diagnosis. During the year 1964, the decedent had at least six more seizures, and his condition had at least three times been diagnosed as a cerebral disorder. Nonetheless, the Army persisted in attributing his condition in part to alcoholism. In December of 1964, the Elimination Board found that decedent had not shown cause why he should be retained in the service, and he was discharged in January of 1965.

In February of 1965 he applied to the Veterans Administration for a disability rating, and was granted a 100% disability in May of 1965 for the cerebral disorder. He also filed an application to the Army Board for Correction of Military Records to have his records altered to show him retired from the military for a physical disability. This application was rejected for insufficient evidence in April of 1965. The decedent subsequently filed another application with the Correction Board. Although in January of 1967 the Surgeon

[1]In a Memorandum-Order filed at an early stage, the District Court treated the defense motion to dismiss as one for summary judgment, and directed the filing by the defense of a Local Rule 1-9(g) Statement of Material Facts as to which there is no genuine issue, with opportunity to appellant to reply. The facts as stated herein are drawn largely from the "Statement." Appellant's opposition did not really controvert the basic facts as alleged by the defense, but rather characterized the Statement as selective and designed to present a one-sided effect. The District Court in its final decision concluded–correctly, we believe–that there were no disputed facts material to its rulings.

General's Office indicated it did not think the request meritorious, the Correction Board declined to follow that recommendation and placed the decedent on the Temporary Disability Retired List; the Board also conceded that the Army's failure to evaluate properly his condition at the time of discharge "was and continued to be in error and unjust." The Board's recommendations that the records be corrected to show that the discharge of January 1965 was of no force, and that McMahon was relieved from active duty by reason of physical disability, were effected in March or April of 1967.

There followed periodic physical examinations required of individuals placed on the Temporary Disability Retired List, which required the decedent to come to Walter Reed Hospital from his new home in West Virginia. In 1968 his case was referred to a Physical Evaluation Board for consideration of permanent retirement. Decedent was informed around the first of April, 1969 that the Board recommended placing him on permanent 20% disability. After he indicated non-concurrence in this recommendation, the Board on April 23 recommended 100% disability and McMahon concurred. On May 6, 1969 he was found unconscious and expired on June 5, 1969. Around June 1, 1971 plaintiff filed an administrative claim which the Army denied on December 30, 1971. The instant action was filed on June 6, 1972.

In his award of summary judgment, Judge Gasch, with reason, found untimely any claim based upon misdiagnosis. By May of 1965, decedent was aware that the Army had changed its diagnosis, and his 100% disability had been approved; by April of 1967, the Army Correction Board conceded error and corrected

his records. The two year statute of limitations for medical malpractice is tolled when the plaintiff knew or with reasonably diligence should have known of the allegedly negligent acts, *see Jones v. Rogers Memorial Hosp.*, 442 F.2d 773 (D.C. Cir. 1971), and that time is more than two years before the filing of the administrative claim in June of 1971.

As for the wrongful death claim based upon administrative negligence and harassment, Judge Gasch found that plaintiff's allegations of harassment or negligence were entirely unsupported, and that normal statutory procedures were followed; even if mistakes were initially made, ultimately the decedent was classified properly, and the Army never breached its duty to determine his status in accordance with established procedures. This ruling also appears to be amply supported by the record. Decedent may well have felt oppressed by the Army's originally erroneous response to his condition and its conceivably sluggish efforts to remedy that error, but that seems to fall far short of proof of a tortious breach of duty.

The other points raised by the plaintiff are equally without merit. As no objection was taken to the consideration on summary judgment of military records introduced by the Government, or to the completeness of the record upon which that determination was made, any such objection is waived.

The District Court wrote a detailed and careful memorandum opinion which, we believe, fully warrants our affirmance in this case.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIE M. McMAHON, Widow of Major Richard J. McMahon AUS Retired, 0-1874291 (Deceased), Plaintiff,	)	
v.	)	Civil Action
UNITED STATES OF AMERICA, Defendant.	)	No. 1132-72

MEMORANDUM-ORDER

This matter came before the Court upon defendant United States' motion for summary judgment and plaintiff's opposition thereto.[1] Plaintiff filed a complaint for "negligence–wrongful death" under the Federal Tort Claims Act,[2] alleging that:

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[1]Defendant originally filed a motion to dismiss for lack of jurisdiction, in that the action was barred by the statute of limitations, and for failure to state a claim upon which relief could be granted. Because that motion referred frequently to Major McMahon's Army records to supplement the factual allegations of the complaint, the Court determined that the motion should be treated as one for summary judgment. Accordingly, on May 14, 1974, the Court directed defendant to prepare a statement of material facts as to which there is no genuine issue, and afforded plaintiff an opportunity to respond thereto.

[2]28 U.S.C. §1346.

> As a direct and proximate result and in consequence of the negligence of the defendant by its agents, employees and servants in their failure to exercise due care in diagnosis and treatment of the deceased and in their harassment and negligent administrative handling of the case of the deceased, the said defendant created emotional stress, repeated seizures and caused the death of Major Richard J. McMahon. WHEREOF, the plaintiff, Marie M. McMahon, administratrix of the estate of Major Richard J. McMahon demands judgment against the United States of America in the sum of $1,500,000.00 and costs of their proceeding.[3]

Defendant's motion for summary judgment reflects a considerable amount of research into the Army medical and personnel records of Major McMahon, and plaintiff does not controvert the basic facts set forth in the government's Rule 1-9(g) statement. However, plaintiff contends that the government's statement is "highly selective, incomplete and designed to present a totally one-sided effect as to those facts as selected."[4]

The objections raised by plaintiff take three basic forms: first, that the medical records are not clear as to whether Major McMahon's behavioral patterns changed abruptly or gradually; second, that Major McMahon did not have the severe drinking problem alluded to in certain diagnoses; and third, that the administrative handling of plaintiff's disability was a cause of emotional stress and resulted in his death. As will be shown more fully below, in spite of these objections by

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[3]Amended Complaint, filed September 27, 1972, at 2-3.

[4]Plaintiff's Reply to Defendant's Motion for Summary Judgment, filed June 17, 1974, at 1.

plaintiff, the government is entitled to summary judgment in this case. For purposes of discussing the merits of defendant's motion, a brief statement of the facts, as drawn from the government's statement and plaintiff's reply, is in order.

In July, 1963, recently-promoted Major Richard J. McMahon was stationed in Korea, where on September 13, 1963, he suffered a seizure in an Officers' Club and was hospitalized for 16 days with a diagnosis of delirium tremens and, secondarily, grand mal seizure. Five days after his discharge, he was again hospitalized, this time for 25 days, with a diagnosis of chronic alcoholism.

Shortly thereafter, on November 7, 1963, Major McMahon's commanding officer recommended that he be eliminated from the service. Superiors concurred, and on January 21, 1964, an Elimination Selection Board, meeting in Washington, ordered Major McMahon to show cause why he should be retained in the Army. On March 19, 1964, Major McMahon was examined physically and psychiatrically by a team of three Army doctors. They determined that Major McMahon was not suffering from either chronic psychosis due to alcohol or an epileptic seizure at the time he committed the actions that led to the show cause order. Their diagnosis was alcohol, delirium tremens, stress and maladjustment. A Board of Inquiry was convened on March 23, 1964, in Seoul, Korea, and reviewed these recent medical reports. The Board determined that Major McMahon failed to recognize his financial responsibilities to his family and that his intemperance had caused a decline in his effectiveness as an officer. The Board recommended that Major McMahon be eliminated from the service.

Shortly thereafter, Major McMahon was transferred to Redstone ARsenal, Alabama, where he suffered another grand mal seizure April 28, 1964. He was initially evaluated in Martin Army Hospital, then was transferred on May 20, 1964, to Brooke Army Hospital, San Antonio, Texas, where, after a complete neurological examination, he was given a diagnosis of localized cerebral cortical atrophy, manifested by temporal lobe and grand mal seizures. He was returned to Redstone Arsenal under a special profile for assignment to duties where a sudden loss of consciousness would pose no danger to himself or others. Major McMahon thereafter suffered three more seizures.

On July 20, 1964, Major McMahon was sent to Walter Reed Army Hospital, Washington, D.C., where he was observed for aperiod of time. The diagnoses agreed with those of the doctors at Brooke Army Hospital: minimal cerebral cortical atrophy, grand mal seizure disorder, and a passive-dependency reaction, or immature personality. He was returned to limited duty.

On December 22, 1964, the Board of Review for Eliminations determined that Major McMahon had not shown cause for which he should be retained in the service, and on January 29, 1965, he was honorably discharged. Thereafter, Major McMahon moved on two fronts: on February 15, 1965, he applied to the Veteran's Administration (VA) for a disability rating, and on February 24, 1965, he petitioned the Army Board for Correction of Military Records (ABCMR) for relief. The latter denied his application April 21, 1965, but a month later the former, after an examination, granted Major McMahon a 100 percent disability rating for a chronic brain syndrome associated with convulsive disorder with cerebral atrophy, retroactively effective January 30, 1965, the day following his discharge.

Thereupon Major McMahon made an effort with the ABCMR to have his records changed to reflect a retirement for physical disability.[5] After a hearing March 29, 1967, the Board concluded that (1) a reasonable doubt had been raised as to whether he was physically fit at the time of separation, (2) that the doubt should be resolved in his favor, (3) that he should have been found physically unfit for duty at the time of his discharge, (4) that there was a sufficient basis for the 100% VA disability rating, (5) that his physical condition at the time of his discharge warranted his placement on the Temporary Disability Retired List (TDRL), (6) that placement on the TDRL will result in periodic evaluation to determine the permanency and degree of severity of his disability, and (7) that the failure of the Army to properly evaluate his physical disability at the time of his discharge was and continued to be in error and unjust.

Further, the Board recommended that all Army records of Major McMahon be corrected to show:

a. that his honorable discharge on 29 January 1965 from active service and from all his commissioned officer appointments is void and of no force or effect;

b. that he was physically unfit to perform the duties of his office, rank or grade by reason of chronic brain syndrome, associated with convulsive disorder and cerebral atrophy; that such disability

[5]Although Army records indicate that Major McMahon sought a change to reflect a retirement for physical disability, plaintiff asserts that "his only desire at the time of discharge in 1965 and since was total restoration to active duty." Plaintiff's Reply to Defendant's Motion for Summary Judgment, filed June 17, 1974, at 7.

may be permanent with a rating of 100 per cent in accordance with Diagnostic Code 9307 of the Veterans Administration Schedule for Rating Disabilities; that the disability was incurred while he was entitled to receive basic pay as a member of a Reserve component on active duty; that the approximate date of origin or inception was prior to 29 January 1965; that it was incurred in time of war or national emergency; that it did not result from misconduct or wilful neglect; that it was the proximate result of performance of duty and in line of duty; and that it was not incurred in combat with an enemy of the United States or as the result of an instrumentality of war; and

c. that he was relieved from active duty on 29 January 1965 by reason of physical disability and placed on the Temporary Disability Retired List of the Army in the grade of major, with entitlement to retirement pay as of 30 January 1965 under the provisions of 10 U.S.C. 1202 and 1372.[6]

The Under Secretary of the Army approved the findings, conclusions and recommendation of the ABCMR, and in March, 1967, Major McMahon was placed on the Temporary Disability Retired List retroactively effective January 29, 1965.

On July 17, 1967, Major McMahon returned to Walter Reed for an interim examination and was continued on the TDRL. On July 9, 1968, he again returned for an examination, at which time the medical staff recommended that Major McMahon be referred to a Physical Evaluation Board to be considered for permanent retirement. On April 23, 1969, a Physical

[6]Defendant's Exhibit 1, pp. 36, 170.

Evaluation Board recommended permanent retirement with 100% disability.[7]

Two weeks thereafter, Major McMahon was found unconscious in his West Virginia home and was taken to a Veteran's Administration Hospital nearby; after two weeks he was transferred to the VA Hospital in Washington, D.C., where he died June 5, 1969, at the age of 41. His diagnosis was one of a respiratory

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[7]Plaintiff has attached to the reply to the government's statement of material facts a copy of a form, dated April 1, 1969, from the same Physical Evaluation Board which recommends a 20% disability, and separation from the service with severance pay. This form does not appear in Major McMahon's Army records.

Plaintiff has also attached a letter dated April 14, 1969, from Adjutant General Wickham to Mrs. McMahon, which indicates that Major McMahon did not concur in the April 1 finding of the Physical Evaluation Board and that "a formal Physical Evaluation Board will convene on 23 April 1969 to consider [Major McMahon's] case." Apparently, the April 1 findings were the result of an "informal Physical Evaluation Board." Plaintiff's Exhibits 5-6. The Court notes that the form issued April 23 contains a check mark indicating Major McMahon's concurrence in the 100% disability finding and also bears what appears to be his signature. Further, plaintiff has attached two additional pieces of correspondence to the reply to the government's statement. The second of these (Exhibit 8) is dated April 24, 1969, and is an order for Major McMahon to travel to Walter Reed General Hospital on April 23, 1969, "for further physical examination." The other letter (Exhibit 7) is dated July 25, 1969, addressed to Mrs. McMahon, and corrects the April 24, 1969, communication by instructing Major McMahon to return to Walter Reed Army Medical Center "for the purpose of appearing before a formal physical evaluation board hearing." These were apparently sent in error, in light of the final finding of the Physical Evaluation Board on April 23, 1969.

ailment mixed with evidence of epilepsy; the causes of death were (1) bronchopneumonia bilateral (terminal), (2) seizure disorder (primary), and (3) aspiration (contributory).

Plaintiff filed an administrative claim with the Department of the Army May 28, 1971, which was denied December 30, 1971.[8] She thereupon filed this lawsuit June 6, 1972, pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2675(a). Plaintiff has complied with the time limitations set forth in 28 U.S.C. §2401(b).

The government's main argument is that if Major McMahon had at any time a claim against the Army for maldiagnosis of his epileptic condition, such claim was no longer in existence at the time of his death due to the expiration of the relevant two-year statute of limitations. Therefore, the government contends, if Major McMahon had no actionable claim in June of 1969, his widow cannot now have one. The Court finds this conclusion persuasive, but not wholly dispositive of the case.

Defendant has cast this action into the mold of medical malpractice, and indeed certain portions of the case do resemble a malpractice claim. Having done so, the government then contends that the test of accrual for a malpractice action is that adopted by Judge Holtzoff's carefully researched decision in *Burke v. Washington Hospital Center,* 293 F. Supp. 1328 (D.C.D.C. 1968):

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[8]Plaintiff indicates that the actual date of submission was June 1, 1971.

> the statute of limitations begins to run when the patient becomes aware, or should have become aware of what had happened [the injury].[9]

From this premise, the government argues that Major McMahon knew or should reasonably have known of any previous misdiagnosis of his epileptic condition by May 17, 1965, when the Veteran's Administration gave him a 100% disability upon a diagnosis of chronic brain syndrome associated with convulsive disorder and with cerebral atrophy. Thereupon, the mandatory two-year statute of limitations for Federal Tort Claims Act cases began to run, and when Major McMahon died June 5, 1969, there exited no cause of action that would give his widow grounds for a lawsuit now.

Clearly this is the accrual test that should apply to a Federal Tort Claims Act case,[10] were this the usual medical malpractice lawsuit. However, plaintiff has repeatedly asserted that this is a wrongful death action, not solely for medical malpractice, thus arguing that plaintiff's cause of action cannot be limited by any such interpretation of the statute of limitations. Plaintiff further argues that because this is a wrongful death action, not a survival action, it comes under the rule of *Kington v. United States*, 396 F.2d 9 (6th Cir. 1968), which held that the statute of limitations begins

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[9]293 F. Supp. at 1333-34. *See also Jones v. Rogers Memorial Hospital*, 442 F.2d 773 (D.C. Cir. 1971).

[10]The *Burke* rule as to accrual of medical malpractice cases is the extant rule in at least two circuits for Federal Tort Claims Act cases. *See Beech v. United States*, 345 F.2d 872, 874 (5th Cir. 1965); *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962); *Quinton v. United States*, 304 F.2d 234, 240 (5th Cir. 1962).

to run from the date of the death. There is no question but that plaintiff has timely filed from that date.

Kington does not control the present case. There, plaintiff was the widow of a man who had been exposed to Beryllium while working at a federal installation in 1946-47. He contracted berylliosis, which caused his death on July 6, 1964. An autopsy report September 1,1964, revealed the cause of death. After two filings were voluntarily dismissed, the widow filed an action August 29, 1966, in the federal district court for the Eastern District of Tennessee. The complaint was under the Federal Tort Claims Act and was one for wrongful death. The lower court dismissed the suit as untimely, and the Sixth Circuit Court of Appeals affirmed for the reason that suit was filed more than two years after the date of death. The case is authority for the proposition that under the facts set forth there the time for filing of wrongful death actins runs from the date of the death.[11]

This Court must look to the District of Columbia wrongful death statute to determine the accrual of the cause:

> When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured . . . to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable

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[11]See 22 Am Jur 2d, Death, §40. The Court of Appeals specifically refused to follow the *Beech-Hungerford-Quinton* line of decisions on the ground that those cases were not wrongful death actions. *See* n. 10 *supra*.

to an action for damages for the death, notwithstanding the death of the person injured. . . .[12]

Clearly, this Lord Campbell statute, like the original,[13] requires that the decedent have an actionable cause at the time of his death.[14] Thus, particular attention must be given to the question of whether or not Major McMahon had an actionable cause at the time of his death; if so, there is no question but that the statute of limitations on plaintiff's cause accrued at that time. In this regard, then, the *Kington* case is not dispositive of the case at bar. Factually, *Kington* is clearly distinguishable. The cause of death there was determined by an autopsy after death. Here, the illness which plaintiff alleges caused the death was known years before death.

At this point, the government would renew its position that the statute of limitations had run on any claim Major McMahon may have had for maldiagnosis of his true condition. The Court agrees, but, as noted before, this cannot be wholly dispositive, because plaintiff has alleged that, in addition to the maldiagnosis of his condition, the administrative handling of Major McMahon's case caused emotional stress that

[12]16 D.C. Code §2701. It is plaintiff's contention that the "actions or omissions herein complained of occurred in this Judicial District. . . ." Amended Complaint at 1.

[13]9 & 10 Vict., c. 2 (1854).

[14]*See generally Michigan C. R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Brown v. Curtin & Johnson, Inc.*, 221 F.2d 106 (D.C. Cir. 1955); *Harris v. Embrey*, 105 F.2d 111 (D.C. Cir. 1939); *Jones v. Pledger*, 238 F. Supp. 638 (D.C.D.C. 1965), *rev'd on other grounds* 363 F.2d 986 (D.C. Cir. 1966); O'Neil v. Sheton Bros. Trucking Co., 116 F. Supp. 654 (D.C.D.C. 1953).

contributed to his demise. Such emotional stress is alleged to have continued up to the date of death.[15]

Assuming Major McMahon had had a valid complaint for maldiagnosis of his condition, the statute of limitations on that particular portion of the present complaint ran long before June 5, 1969. His condition, according to the record put forth by defendant and substantively uncontroverted by plaintiff, had been correctly diagnosed by June-July, 1964. Certainly, the granting of a 100% disability rating by the VA on May 17, 1965, for chronic brain syndrome associated with convulsive disorder and cerebral atrophy made clear that any prior diagnosis of chronic alcoholism was not a complete or correct diagnosis. At that time, Major McMahon knew or should reasonably have known of any damage that may have occurred due to any previous maldiagnosis.

Having found that Major McMahon had no claim as to maldiagnosis of his condition at the time of his death, the Court must now decide if he had any actionable claim for the emotional stress allegedly caused by the administrative procedures conducted by the Army from 1964 to 1969. Initially, it cannot be said that the Army acted beyond or in want of statutory procedures or maliciously. Normal procedures were followed. Thorough medical examinations and administrative hearings were held. Disagreements as to Major McMahon's disability status occurred, but ultimately the disposition reached was in accordance with the 1965 VA finding: 100% disability.[16] The duty owed Major McMahon was to determine his retirement

[15]*See* note 7, *supra*.

[16]*See* note 5, *supra*.

and disability status in accordance with the Army's established procedures. Undisputed facts in the record show that this was done. Accordingly, it is by the Court this 17th day of July, 1974,

ORDERED that defendant's motion for summary judgment be and the same is hereby granted.

/s/[Illegible]
Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MARIE M. McMAHON, widow of Major Richard J. McMahon AUS Retired, 0-1874291 (Deceased), Plaintiff,	)	
v.	)	Civil Action No. 1132-72
THE UNITED STATES OF AMERICA, Defendant.	)	

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

The certified administrative records relating to Major Richard J. McMahon, deceased, have been filed by defendant and marked as Government Exhibits 1-4. These records contain the factual personnel, medical, and administrative data of Major McMahon's military service. A brief factual summary of these records has been previously submitted by defendant at pages 2-7 of the memorandum of points and authorities in support of defendant's motion to dismiss.

By order of May 14, 1974, this Court determined that defendant's motion to dismiss should be treated as a motion for summary judgment and that defendant should file a statement of material facts as to which there is no genuine issue. Pursuant to that order, and in general conformity with Local Rule 1-9(g), defendant

submits herewith a statement of facts with references to pages in the record.[1] The facts with particular materiality to defendant's legal position are marked with an asterisk.

1. Major Richard B. McMahon entered active duty with the United States Army as an enlisted man on September 18, 1946. He progressed through the ranks and was promoted to major, Army of the United States, on February 15, 1963. (Exh. 1, 167; Exh. 2, 715).

2. Pursuant to a recommendation of November 7, 1963 by his commanding officer that Major McMahon should be eliminated from the service, which was concurred in by the Commanding General, 8th Army, an Elimination Selection Board of officers was convened and met at the Pentagon on January 21, 1964. Upon review of the records, the Board determined that Major McMahon should be required to show cause why he should be retained in the Army. (Exh. 1, 97-105).

* 3. Prior to that time, Major MaMahon had been hospitalized at the 111st Evacuation Hospital from September 13, 1963 until September 29, 1963 with a diagnosis of delirium tremens and grand mal seizure secondary to the above, and from October 4, 1963 until October 29, 1963 with a diagnosis of chronic alcoholism. (Exh. 1, 80, 62, 118).

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[1] While defendant does reference pages in the record to support these facts, defendant does not attempt to reference every page in the record which might contain additional support for the same fact. References are made to the Government Exhibit and page number, e.g. (Exh. 1, 166-171).

4. Following the determination that Major McMahon be required to show cause for retention, he received physical and psychiatric examinations at the request of his counsel. The report indicated that the examinations revealed no evidence of organic, psychotic, or neurotic mental illness, no evidence of convulsive disorder (epilepsy), and no evidence of disabling or significant physical illness. The examining doctors expressed the opinion that he was not suffering from chronic psychosis due to alcohol, mental defect, or phileptic seizure at the time he committed the acts which resulted in the determination that he should be required to show cause for retention. His diagnosis was chronic alcoholism and maladjustment, and he was cleared medically and psychiatrically for appropriate administrative action. (Exh. 1, 94-96).

5. On March 23, 1964, Major McMahon appeared before a Board of Inquiry in Seoul, Korea. Following a hearing, the Board found that (1) he had failed to recognize his responsibilities in the area of finances concerning his family, and (2) his intemperance for the past year had caused a gradual decline in his effectiveness as an officer. The Board recommended that Major McMahon be eliminated from the service. (Exh. 1, 106-164).

* 6. Thereafter Major MaMahon was transferred to Redstone Arsenal, Alabama, and on April 28, 1964, he had another grand mal seizure in the Officer's Club there. (Exh. 1, 62). He was transferred to the Martin Army Hospital for a neurological workup, and while there he had another grand mal seizure. The diagnosis was seizure - focal motor and temporal lobe. (Exh. 1, 57, 62).

7. He was transferred to the Neurological Service, Brooke Army Hospital, San Antonio, Texas on May 20, * 1964. On June 2, he had an episode which was interpreted as a possible focal seizure. After a complete neurological examination, his diagnosis was cerebral curtical atrophy, localized, demonstrated on carotid arteriogram, manifested by temporal lobe and grand mal seizures. (Exh. 1, 62-64). On June 15, 1964, he was returned to duty at Redstone Arsenal with a permanent P-3 profile with instructions that he was not to be assigned to a unit where sudden loss of conscionsness would be dangerous to himself or others. (Exh. 1-57, 64). Thereafter, he had three more seizures and was sent to Walter Reed Army Hospital, Washington, D.C. on July 20, 1964. (Exh. 1-57).

8. Although during his hospitalization at Walter Reed he was observed as passive with signs of anxiety, there were no observed seizures. On two occasions he was noted as returning from week-end passes apparently * under the influence of alcohol. The relevant diagnoses were (1) Atrophy, cerebral cortical, minimal, etiology unknown; (2) Seizure disorder, grand mal, etiology unknown, well controlled on medication; (3) Passive-dependancy reaction (immature personality), manifested by clinging behavior, ingratiating demeanor, passivity, and denial of problems concerning alcoholic intake. (Exh. 1, 56-59; Exh. 2-9).

9. The Medical Board at Walter Reed was of the opinion that Major McMahon was able to distinguish right from wrong and adhere to the right, was mentally able to understand the nature of the Elimination Board proceedings pending against him and to cooperate in his defense, and that there were no physical or mental defects warranting medical disposition under the

provisions of Army Regulation 635-48A or B. It was recommended that he be returned to duty with a permanent S-2 profile, and that he continue on the present dosage of medication. (Exh. 1-60).

10. On December 22, 1964, the Board for Review of Eliminations, upon review of all of the records, determined that Major McMahon had not shown cause why he should be retained in the service. (Exh. 1, 51-51). January 29, 1965, upon completion of 15 years and 8 months of active Federal Service, he was honorably discharged from active service and from his commissioned officer appointments. (Exh. 1-167; Exh. 2-715).

11. Shortly after his discharge, he filed an application for relief with the Army Board for Correction of Military Records. (Exh. 1-204). In addition, on February 15, 1965 he filed an application with the Veterans Administration for a disability rating. (Exh. 2-7).

12. The Board for Correction denied the application for insufficiency of evidence on April 21, 1965, and he was notified on May 7, 1965. (Exh. 1, 202-203; Exh. 2-16). This decision was not appealed. The Veterans * Administration examined Major McMahon on April 23, 1965, and on May 17, 1965 gave him a 100% disability rating for chronic brain syndrome associated with convulsive disorder with cerebral atrophy, effective January 30, 1965, the day following his discharge. (Exh. 2-7; Exh. 1-168).

13. Thereafter he filed another application with the Army Board of Correction of Military Records to have his military records corrected to show him retired from the Army on January 29, 1965 by reason of physical

* disability. (Exh. [illegible]3, 166-167). On January 26, 1967, the Surgeon General's Office, after review of all of the military and medical records, expressed the opinion to the Board that at the time of Major McMahon's separation, he had no physical or mental impairment of a degree of severity which would warrant retirement for a physical disability. (Exh. 1, 39-40).

14. A hearing was conducted on March 29, 1967, and the Board concluded that (1) a reasonable doubt had been raised as to whether he was physically fit at the time of separation, (2) that the doubt should be resolved in his favor, (3) that he should have been found physically unfit for duty at the time of his
* discharge, (4) that there was a sufficient basis for the 100% VA disability rating, (5) that his physical condition at the time of his discharge warranted his placement on the Temporary Disability Retired List, (6) that placement on the TDRL will result in periodic evaluation to determine the permanency and degree of severity of his disability, and (7) that the failure of the Army to properly evaluate his physical disability at the time of his discharge was and continued to be in error and unjust. (Exh. 1, 32-36, 166-170, 172-196, 198-201).

15. The Board recommended that all Army records of Richard J. McMahon be corrected to show (Exh. 1-36, 170):

a. that his honorable discharge on 29 January 1965 from active service and from all his commissioned officer appointments is void and of no force or effect;

b. that he was physically unfit to perform the duties of his office, rank or grade by reason of chronic brain syndrome, associated with convulsive

disorder and cerebral atrophy; that such disability may be permanent with a rating of 100 per cent in accordance with Diagnostic Code 9387 of the Veterans Administration Schedule for Rating Disabilities; that the disability was incurred while he was entitled to receive basic pay as a member of a Reserve component on active duty; that the approximate date of origin or inception was prior to 29 January 1965; that it was incurred in time of war or national emergency; that it did not result from misconduct or wilful neglect; that it was the proximate result of performance of duty and in line of duty; and that it was not incurred in combat with an enemy of the United States or as the result of an instrumentality of war; and

c. that he was relieved from active duty on 29 January 1965 by reason of physical disability and placed on the Temporary Disability Retired List of the Army in the grade of major, with entitlement to retirement pay as of 30 January 1965 under the provisions of 10 U.S.C. [illegible].

16. The Under Secretary of the Army approved the findings; conclusions and recommendation of the Army Board for Correction of Military Records, and in March, 1967, Major McMahon was placed on the Temporary Disability Retired List effective January 29, 1965. (Exh. 1-[illegible].

17. In 1967, Major McMahon moved to Berkeley Springs, West Virginia. (Exh. 1-28).

18. On July 17, 1967, Major McMahon returned to Walter Reed Army Hospital for a routine interim examination. The Medical Staff was of the opinion that his condition was unchanged since his discharge from that hospital in 1964. The Medical Staff recommended that he be continued on the Temporary Disability Retired List and be re-evaluated in one year. (Exh. 1, 28-29).

19. On July 9, 1967, he returned to Walter Reed for another routine interim examination. The medical staff determined that the patient's condition was unchanged and made the same diagnoses as in 1964 and 1967. They recommended, in light of the earlier action by the BCMR, that he be referred to a Physical Evaluation Board for consideration of permanent retirement. (Exh. 1, 20-21).

20. A Medical Board met on November 26, 1968 and referred the case to a Physical Evaluation Board for consideration of permanent retirement. (Exh. 1, 18-19).

21. On April 23, 1969, a Physical Evaluation Board recommended that Major McMahon be permanently retired on 100% disability. This recommendation was concurred in by Major McMahon. (Exh. 1-14). Approval was recommended by a Physical Disability Appeal Board. (Exh. 1, 10-12).

22. Following the action by Physical Evaluation Board, Major McMahon returned to his home in West Virginia and his wife remained at Walter Reed for medical treatment. On May 6, 1969, a neighbor found him in his home in an unconscious state. Apparently he had been unconscious for 18-24 hours. He was transported to the Veterans Hospital at Martinsburg, West Virginia. The doctors were aware of his prior history of epilepsy and it was their impression that the coma was probably related to the epilepsy. His chest was full of mucous which was interpreted as aspiration pneumonia. (Exh. 3 - 204-212).

23. He regained consciousness within forty-eight hours and showed no evidence of neurologic defect. He advised the doctors that he had no memory of the event which made him unconscious. He also advised that he had had a chest cold for the past week prior to

the illness. He received treatment but his condition improved very little. (Exh. 3 - 204-230).

24. On May 20, 1969, he was tranferred to the Veterans Hospital, Washington, D.C. Despite intensive care, his condition did not improve. (Exh. 3, 14-15). He died on June 5, 1969. (Exh. 3-57) The death certificate reflected the cause of death as (1) [illegible] pneumonia bilateral (terminal), (2) seizure disorder (primary) and (3) aspiration (contributory). (Exh. 4, 28-30).

25. Plaintiff filed an administrative claim on May 28, 1971 and it was denied by the Army on December 30, 1971. The instant action was filed on June 6, 1972.

EARL J. SILBERT
United States Attorney

ARNOLD T. [illegible]KENS
Assistant United States Attorney

ROBERT S. RANKIN, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

IN HEREBY CERTIFY that service of the foregoing Defendant's Statement of Material Facts as to which there is no Genuine Issue has been made upon plaintiff by mailing a copy thereof to Vincent H. Santoro, 100 South Royal Street, Alexandria, Virginia 22314, on this 29th day of May, 1974.

ROBERT S. RANKIN, JR.
Assistant United States Attorney
U.S. District Courthouse
Room 3435
Washington, D.C. 20001
Telephone: 426-7352

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MARIE M. McMAHON Administratrix of the Estate of Major Richard J. McMahon AUS Retired, 0-1674291 (Deceased)	)	
Plaintiff,	)	CIVIL ACTION
vs.	)	NO. 1132-72
UNITED STATES OF AMERICA	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Your plaintiff finds the defendant's statement of material facts as to which there is no genuine issue to be highly selective, incomplete and designed to present a totally one-sided effect as to those facts so selected. Accordingly, your plaintiff will proceed to present those facts not heretofore listed by the defendant, and are highly material and concerning which there remains a genuine dispute as heretofore Ordered by this Honorable Court by *MEMORANDUM ORDER* entered on the 14th day of May, 1974.

For clarity, plaintiff's comments will be numbered consistent with the numbered paragraphs of the defendant's statement. References will also be made to Exhibits and page numbers as has your defendant in the said statement:

1. Defendant's statement of decedent's military career is obviously incomplete. A more complete and

accurate recital is contained in paragraph (b) Exh. 1, page 167. As an officer, decedent's record was apparently superior to outstanding until in 1963 he became ineffective and due to his unusual behavior, a tendered Regular Army (RA) commission was withdrawn. (Exh. 1, 35; Exh. 2, 294, 301-306, 513-516, 531-629A)

2. Not mentioned in defendant's Motion for Summary Judgment is the fact that, due to decedent's outstanding-superior performance of duty, he was actually appointed a Captain in the Regular Army having been nominated by the President of the United States and confirmed by the Senate thereof. (Exh. 2, page 40). This affirmative action is in direct conflict with the subsequent recommendation by his immediate commander that he should be required to "show cause" why he should be retained in the Army due to dereliction of duty.

The military record remains in conflict as to whether the decedent had a "gradual" or an "abrupt" change in behavioral patterns–and this is material to decedent's cause due to the inherent nature of his illness. (Exh. 1, 15-18, 20-21, 28-19, 32-36).

It is difficult to fathom how following actual appointment in the RA on 23 April 1963, the Army could withdraw his "tender of appointment"––and that such notice to the decedent would have been made by his ward doctor, who would be authorized merely to treat decedent while hospitalized, but who exercised *no* command function over his patient. (Exh. 2, 23-29).

3. While decedent was periodically alleged to have been the victim of chronic alcoholism, his diagnosis of delirium tremens––and grand mal seizure secondary to such diagnosis appears to have been completely

disregarded in his case. At no point have medical authorities given a blood test to the decedent for blood alcoholic content and the entire "alcoholic" conclusion is based on physical/mental manifestations of such charge, including the oft repeated "fruity odor" on the breath. (Exh. 2, 44, 47-50) (Exh. 1, 94).

4. Though cleared at this time, the diagnosis has been totally refuted by later and more complete examinations. The weight of all evidence in the record indicates this isolated diagnosis to be erroneous. (Exh. 1, 3-4, 11-12, 15-18, 20-21, 28-29, 31, 34-36).

5. The record is replete with conflict as to whether this officer, the decedent, experienced an *abrupt* or *gradual* decline in effectiveness. References to the said conflict appear in paragraph 2, supra.

It is to be noted that while the recitation contained in defendant's Motion for Summary Judgment is not incorrect as stated, subsequent actions taken by both the Veterans Administration (paragraph 12, Defendant's Motion for Summary Judgment), the Army Board for Correction of Military Records (ABCMR) (paragraphs 14 and 15, supra) and the Under Secretary of the Army (paragraphs 14 and 15, supra) and the Under Secretary of the Army (paragraphs 16, supra) all refute this Board of Inquiry action. (Exh. 1 20, 28, 1-36, 166-170, 172-196, 198-201). (Exh. 2-7).

6. Appears to be in error. The record indicates that the patient was admitted to Brooke Army Hospital on 20 May 1964 as a transferee from Martin Army Hospital where he was admitted in late April 1964. In any event, diagnosis was seizure, focal motor and temporal lobe with no reference to chronic alcoholism whatever except as a review of prior medical history based on hearsay only. (Exh. 1-62)

7. P-3 profile allocated to Major McMahon on a permanent basis is contradicted by the narrative summary of the Walter Reed General Hospital of 20 July 1964, wherein the medical authorities recommended that he be returned to duty with a permanent S-2 profile. (Exh. 1-60, 64)

8. Your plaintiff admits of no reference to decedent being under the influence of alcohol. Such allegations are frivolous and unsupported in fact, and have no standing in a Court of law. The mere unsupported allegation, without expert medical tests readily available are pure hearsay in its most crude form and even the allegation herein is couched in most evasive terms: "*apparently* under the influence of alcohol." (Exh. 1, 56-59). Throughout the record provided the plaintiff there is a significant lack of actual eye-witness testimony of excessive drinking (alcohol) on the part of the decedent. All allegations regarding "chronic alcoholism" are preceded by such vague terms as "apparently" "fruity odor on the breath" etc. But the record does clearly establish that the decedent on 9 July 1968, by complete physical examination at Walter Reed General Hospital, the Army's foremost medical research center, there was no clinical evidence of cirrhosis. (Exh. 1, 20).

9. Walter Reed General Hospital Narrative Summary of 20 July 1964 indicates absolutely nothing regarding alcoholic intake except decedent's denial thereof and proceeds to list under the heading Diagnosis: "Seizure disorder, grand mal, etiology unknown, well controlled on medication." (Exh. 1, 59-60). The problem and genuine dispute here arises as to the decedent's ability, prior to, during and subsequent to severe seizures, to assure that he was physically/mentally competent to take the medication prescribed. Surely this was the case

when he was found unconscious in his home in Berkeley Springs, West Virginia, on 5/6/69. The record clearly states that "there was *no* indication that he was an alcoholic in recent months". (Exh. 3-204).

10. The decedent, at this point, simply was unable to defend himself due to repeated seizures and the emotional pressure brought about by the series of Army proceedings against him. The Army Board of Review for Eliminations hearing dated 22 December 1964, as furnished by the defendant in this cause is obviously incomplete. The Board met initially on 23 March 1964, but final decision re granting decedent an Honorable Discharge delayed until 3 October 1964. (Exh. 1, 44). No medical reports considered by the said Board as Exhibits 3 and 4 have been furnished the plaintiff herein. (Exh. I, 47-54). While decedent was "Honorably Discharged" from the active military service as stated, this was as a result of "elimination", an act and a term which carries grave personal and professional degradation in the eyes of the military establishment. (Exh. 1-167; Exh. 2-715). It took the dogged and determined effort on the part of the decedent, aided by his faithful spouse to overturn this stigma on a truly outstanding officer's career and reputation as described in detail by the defendant's Motion for Summary Judgment in paragraphs 12; (Exh. 2-7), 14; (Exh. 1, 32-36, 166-170, 172-196, 198-201), 15; (Exh. 1-36, 170). It is to be noted that these so called "corrective actions" on the part of the U.S. Army occur in 1967 following error, harrassment, and refusal to grant reasonable review and decision in decedent's cause following the clear mandate of the Veterans Administration granting 100% disability back in May 17, 1965 (Exh. 2-7; 1-168).

11. Decedent was by this time as distraught and under such emotional stress that he was unable to clearly affix his own name to his application for relief to the ABCMR on February 24, 1965. (Exh. 1-204).

12. Decedent's personal representative has no record of ever having received the notice of denial of his application for correction of records dated April 21, 1965. (Exh. 1, 202-203; Exh. 2-18). Attention of the Court is invited to the two (2) references cited by defendant. The first is stamp-dated 7 May 1965 and the second undated in the manner of the first, but is stamp-dated at the bottom "5 May 1965". Plaintiff contends that until some later date when notified by the Disabled American Veterans (counsel for decedent) for the second application he had no knowledge of the purported Notification of May 7, 1965.

13. It is plaintiff's contention that until the filing of his second application he had no notice of denial of the prior one. (Exh. 1-33, 166-167). And although at this early date (29 March 1967) the ABCMR is attempting to inject some correction of unjustice to decedent, the Surgeon General of the Army just two (2) months prior refuses to recommend retirement for physical disability. (Exh. 1, 39-40). Surely if decedent was not a candidate for physical disability retirement, then he was entitled to be restored to active duty with commensurate grade, pay and allowances. At this time decedent was on the Temporary Disability Retired List and Army Regulation AR 635-40, adequately provides for return to active duty where the military member is found physically fit. (Exh. 1-36).

14. See paragraph 13, supra.

15. This corrective action by the ABCMR on 29 March 1967 takes place over two (2) years following

decedent's original elimination from the Army on 29 January 1965, and is based on facts/records in the possession and control of the Army at the time of his elimination therefrom. (Exh. 1, 32-36).

16. Action by the Under Secretary occurs on 20 April 1967 again, well over two (2) years following the elimination action. (Exh. 1-31).

17. Plaintiff questions the Military District of Washington (MDW) continued jurisdiction in this matter since the West Virginia geographical location is in the 2nd U.S. Army area (Fort Meade, Maryland).

18. Refer to comments in paragraph 13, supra. (Exh. 1-36)

19. See comments contained in paragraph 13, supra.

20. Decedent had no notice of this convening of the Medical Board on November 26, 1968. Attention is invited to the reference regarding medical and physical defects of decedent, 3531 3, indicating seizure disorder, grand mal---"poorly controlled on adequate medication" (Exh. 1-18) which is in direct conflict with prior examinations establishing that on medication there is "good control of his seizure disorders" (Exh. 1-15).

21. While there appears to be a valid "√" mark indicating concurrence with the PEB 100% disability rating by decedent, his only desire at the time of discharge in 1965 and since was total restoration to active duty. His first knowledge of any review of his disability rating was the DA Form 1361 with cover letter dated 2 April 1969, received date is believed to be on or about 7 April 1969, granting him a 20% disability, "separation with severence pay" (plaintiff's Exh. 5, 1-3) attached hereto and made a part hereof by plaintiff. The added stress following years of error, conflict and dispute in this cause, had by now brought

on more frequent and severe seizures. Your plaintiff following thorough review finds no copies or references to this abrupt reduction to 20% disability rating in the certified copies of government records furnished plaintiff in this cause. (Exhs. 1, 2, 3, 4).

Non-concurrence in this finding is clearly admitted by the then Adjutant General of the Army, Kenneth G. Wickham, by letter to plaintiff dated 14 April 1969, copy of which is enclosed and attached hereto. (Plaintiff's Exh. 6).

22. Having been confronted with this PEB action, reducing, then increasing his % of disability, decedent learned that a "registered letter" was awaiting his pick up in West Virginia, from the Department of the Army. He became more confused, emotional and subjected to his grand mal seizures. The letter proved to be AGPO-AB, McMahon, Richard J. 01 874 291, dated 24 April 1969, Subject: Letter Orders (TDRL), ordering the decedent back to WRGH, on April 23, 1969 "for further physical examinations-----". (Plaintiff's Exh. 7). This is the exact date when the decedent is alleged to have concurred in the PEB 100% rating of disability at WRAMC in Washin gton, D.C., he had just received notice of a reduction to 20% disability and now a notice to report for further physical examination from the Army, all within the space of several days at most. This continued confusion and harrassment of decedent caused added stress on this already crushed man and the diagnosis of the VA doctor at VA Center, Martinsburg, West Virginia, is "coma probably related to epilepsy" (Exh. 3-210) and the same medical summary indicates that the patient in recent weeks "has been under great emotional stress and apparently his fits had increased in frequency". The report continues:

"There was no indication that he was an alcoholic in recent months". (Exh. 3-204)

23. Doctor Vicken Kalbian, VA hospital, Martinsburg, West Virginia, indicates that the onset of epilepsy in this patient may well have occurred as early as 1952 when he was thrown to the ground by mortar fire and began to experience headaches at that time. (Exh. 3-608).

24. Transfer to the VA hospital on May 20, 1969, is admitted and his treating physician was Robert Goldstein, M.D. (Exh. 3-14). The only reference to alcoholism is an absolute denial by both decedent and his wife. (Exh. 3-22). During his stay in the VA hospital in the D.C., the decedent continued to be harrassed, interviewed, called by phone, and prompted to be removed to the Army hospital, at the Walter Reed Medical Center, thus aggravating his already emotional stress condition.

25. Filing of administrative claims as provided for by the Federal Tort Claims Act is admitted; however, actual date of submission appears to be June 1, 1971.

26. Having harrassed decedent and covered up prior unreasonable decisions regarding his military career, Army authorities were unable or refused to cease this pattern of treatment even following decedent's death in the VA hospital on June 5, 1969. The blatant cover up attempt continued. By Letter Order dated 25 July 1969, the Adjutant General of the Army, corrected its prior order from "further physical examination" to a "PEB hearing". This action is approximately one month, three weeks following his demise. (Plaintiff's Exh. 8).

There herein existing innumerable genuine issues of fact in dispute, it is respectfully prayed that defendant's

Motion for Summary Judgment be denied and that this cause proceed to a full hearing on the merits.

/s/ [illegible]
JOSEPH L. PETERS, JR. and
VINCENT H. SANTORO
100 South Royal Street
Alexandria, Virginia 22314
836-8211
Co-Counsel for the Plaintiff

/s/ Gladys L. Fishel
GLADYS L. FISHEL, Esquire
927 15th Street, N.W.
Washington, D.C. 20005
of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the service of the foregoing PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT has been made upon the defendant by hand delivering/mailing a copy thereof to Robert S. Rankin, Jr., Assistant U.S. Attorney, U.S. District Courthouse, Room 3435, 3rd & John Marshall Place, Washington, D.C. 20001, on this 17th day of June, 1974.

/s/ Vincent H. Santoro
Vincent H. Santoro
Counsel for the Plaintiff

AGPO-AB McMahon, Richard J. 24 April 1969
01 874 291

SUBJECT: Letter Orders (TDRL)2192020 11-6980 2580
2200-2190 S49092
ON 01-AC-V214

Major Richard J. McMahon
AUS, Retired
Route 3
Berkeley Springs, WV 25411

Orders having been issued under exigencies which prevented issuance of written orders in advance, the travel directed from the above address to Walter Reed General Hospital, Washington, D.C., on 29 April 1969 for further physical examination and the return to the above address is confirmed and made a matter or record. TDN. TPA. (Authority: 10 U.S.C. 1210). Accounting classification chargeable cited in A above.
BY ORDER OF THE SECRETARY OF THE ARMY:

Adjutant General

* * * *

THE COURT: All right, make it something around the middle of June.

MR. PETERS: That would be more appropriate.

THE COURT: Mr. Rankin, see if you can't promptly get on this thing.

MR. RANKIN: Very well, Your Honor. I think, possibly, Your Honor, I should mention one other point.

I think after the last calendar call this Court entered an order that all discovery should be completed by May 15.

THE COURT: We will extend that.

MR. RANKIN: Very well.

THE DEPUTY CLERK: June 19, at 4:30, Your Honor.

THE COURT: All right.

(Whereupon, at 5:15 p.m., the above-entitled calendar call was adjourned until June 19, 1973, at 4:30 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Duane B. Duschaine
Duane B. Duschaine
Official Reporter

APPENDIX D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

No. 76-134

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARIE M. MCMAHON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-134

MARIE M. MCMAHON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in granting summary judgment for the United States, dismissing her negligence and wrongful death actions under the Federal Tort Claims Act, because there existed a genuine issue as to several material facts.

1. Petitioner's decedent, a major in the United States Army, was hospitalized twice during September and October 1963 for ailments that were diagnosed as delirium tremens and chronic alcoholism. Proceedings begun in November 1963 led to a recommendation by the Elimination Service Board that Major McMahon be removed from the military on grounds of alcoholism. Shortly thereafter, Major McMahon suffered several more seizures and, after a complete neurological examination, his condition was rediagnosed as a cerebral disorder.

Nonetheless, the Elimination Board determined in December 1964 that the decedent should be discharged from the service and, on January 29, 1965, he was honorably discharged (Pet. App. 3a, 3b-4b).

In February 1965, Major McMahon challenged his removal by filing a request with the Army Board for Correction of Military Records to have his records altered to reflect that he was retired for a physical disability. In addition, he applied to the Veterans Administration for a disability rating. The Board for Correction denied the application for insufficient evidence in April 1965; one month later, however, decedent was granted a 100 percent disability rating by the VA, retroactive to January 30, 1965, for chronic brain syndrome associated with convulsive disorder with cerebral atrophy. Decedent then filed a second application for correction of his records. In March 1967, the Board for Correction recommended that the records be changed to reflect that he was relieved from active duty by reason of physical disability, and that he be placed on the Army's Temporary Disability Retired List as of January 29, 1965. The Board's recommendations became effective in March or April 1967 (Pet. App. 3a-4a, 4b-6b).

During the following two years, Major McMahon was periodically examined by Army physicians. In 1968, a Physical Evaluation Board conducted a review of his temporary disability retirement status and recommended that he be permanently retired with a 20 percent disability. After Major McMahon disagreed with this recommendation, the Board in April 1969 recommended 100 percent disability, in which decedent concurred. Two weeks later, Major McMahon was found unconscious in his home; he died on June 5, 1969, from causes determined to be bronchopneumonia bilateral (terminal), seizure disorder (primary), and aspiration (contributory) (Pet. App. 4a, 6b-8b).

Petitioner filed an administrative claim with the Department of the Army on or about June 1, 1971, which was denied on December 30, 1971. She then instituted this action in the United States District Court for the District of Columbia under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2675(a), contending that the government had (1) negligently misdiagnosed decedent's ailments and (2) exacerbated his physical and emotional conditions through harassment and administrative negligence in processing his requests for correction of his records and receipt of disability benefits. The district court granted summary judgment for the government, holding that the negligent misdiagnosis claim was barred by the statute of limitations and that the undisputed facts in the record failed to support a claim of "harassment" and instead showed that the Army had properly followed its own procedures in good faith and had ultimately determined the decedent's status correctly (Pet. App. B). The court of appeals affirmed in an unpublished *per curiam* opinion (Pet. App. A).

2. The district court correctly granted the government's motion for summary judgment, since the records in this case conclusively demonstrated the absence of any genuine issue of material fact.[1] Indeed, even now petitioner has failed to allege any disputed facts which, if proven, would demonstrate that her negligence claim was filed within the applicable statute of limitations or that her harassment claim is meritorious.[2] To the

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[1]Moreover, as the court of appeals observed (Pet. App. 5a), petitioner did not object to the "completeness of the record upon which [the district court's summary judgment] determination was made * * *."

[2]We note that petitioner has also failed to cite any precedent in support of a right to recovery under the Tort Claims Act for administrative "harassment."

contrary, the undisputed evidence shows (Pet. App. 12b) that decedent's

> condition * * * had been correctly diagnosed by June-July, 1964. Certainly, the granting of a 100% disability rating by the VA on May 17, 1965, for chronic brain syndrome associated with convulsive disorder and cerebral atrophy made clear that any prior diagnosis of chronic alcoholism was not a complete or correct diagnosis. At that time, Major McMahon knew or should reasonably have known of any damage that may have occurred due to any previous maldiagnosis.

Therefore, the court's award of summary judgment based on the defense of the statute of limitations was proper. See 6 Moore's *Federal Practice* para. 56.15 [1.-0], p. 56-399 (1976).

Similarly, in regard to the allegation that the emotional stress caused by the Army's administrative processes was the direct and proximate cause of Major McMahon's death, the district court correctly concluded on the basis of the record that petitioner had failed to state "any actionable claim" (Pet. App. 12b). The statement of material facts submitted by the government—which was never specifically controverted by petitioner (Pet. App. 3a, n. 1)—clearly demonstrated that the alleged "harassment" was nothing more than the Army's normal administrative procedures, many of which had been initiated by Major McMahon. As the court noted (Pet. App. 12b-13b; footnote omitted):

> [I]t cannot be said that the Army acted beyond or in want of statutory procedures or maliciously. Normal procedures were followed. Thorough medical examinations and administrative hearings were held. Disagreements as to Major McMahon's disability status occurred, but ultimately the disposition reached was in accordance with the 1965 VA findings: 100% disability. The duty owed Major McMahon was to determine his retirement and disability status in accordance with the Army's established procedures. Undisputed facts in the record show that this was done.

Although petitioner contends that her failure to dispute the government's statement of facts was justified because she was denied the opportunity to pursue discovery, a party opposing summary judgment must at least comply with the spirit, if not the letter, of Rule 56(f), Fed. R. Civ. P.,[3] by setting forth the specific type of proof which, but for lack of discovery, he would have proffered. See, *e.g.*, *Littlejohn* v. *Shell Oil Co.*, 483 F. 2d 1140, 1146 (C.A. 5) (*en banc*), certiorari denied, 414 U.S. 1116. Since petitioner failed to do so and offered no evidence to substantiate the allegations of her complaint or to rebut the government's statement of material facts, summary judgment

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[3]Rule 56(f) provides:

> (f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

for the government was warranted. See, *e.g.*, *Richardson* v. *Rivers*, 335 F. 2d 996, 999 (C.A. D.C.).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[4]*Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, does not support petitioner. Respondent's failure in that case to rebut the possibility that there had been a policeman in its store at the time of the events in question was fatal to its summary judgment motion only because of "the allegation in petitioner's complaint, a statement at her deposition, and an unsworn statement by a Kress employee, all to the effect that there was a policeman in the store at the time of the refusal to serve [petitioner], and that this was the policeman who subsequently arrested her" (398 U.S. at 156-157; footnotes omitted).

DOJ-1976-09